PUBLIC PROSECUTOR

v.

ADETUNJI ADELEYE SULE

SUPREME COURT, KUALA LUMPUR
DATO' SERI ABDUL HAMID BIN HJ. OMAR LP,
DATO' EDGAR JOSEPH JR. SCJ,
DATUK MOHAMED DZAIDDIN BIN HJ ABDULLAH SCJ
[CRIMINAL APPEAL NO. 05-139-92]
8 APRIL 1993

CRIMINAL LAW & PROCEDURE: Charge of trafficking in dangerous drugs - Trial Court finding that prosecution failed to establish prima facie case - Appeal against acquittal and discharge of Accused.

The respondent entered Malaysia at an immigration entry point at Bukit Kayu Hitam, Kubang Pasu, Kedah by bus from Thailand on transit to Singapore. He carried with him an alluminium trunk and a briefcase. Heroin was discovered in a double layer secret compartment located at the bottom of the trunk. The respondent was charged with trafficking in heroin weighing 2,233.9 grams in contravention of s. 39B of the Dangerous Drugs Act 1952 (the Act).

The trial Judge ruled that the prosecution had failed to tender evidence which, if unrebutted, would warrant a conviction relying upon two grounds; namely, the conduct and demeanour of the respondent at the time of his arrest and shortly thereafter and the wholly exculpatory cautioned statement of the respondent made the day after his arrest. The respondent was duly acquitted and discharged without being called to enter upon his defence and the Public Prosecutor appealed.

Held:

[1] It was clear, at the close of the case for the prosecution, that the respondent was in manual possession of the trunk and that the heroin the subject matter of the charge was recovered from a secret compartment therein. Upon that evidence, it was to be deemed, until the contrary was proved, that the respondent was in possession of the heroin and to have known the nature of such drug, by reason of s. 37(1)(d) of the Act, and further, was to be presumed, until the contrary was proved, to be trafficking in the same, by reason of s. 37(1)(da) of the Act.

[2] The conduct and demeanour of an accused may well be relevant and may therefore be taken into consideration when considering what weight should be accorded to the defence version but should not by themselves be sufficient, to rebut a statutory presumption which has been raised against him.

[3] Similarly, where the *onus* lies on an accused to rebut a statutory presumption, a voluntary out of Court statement by the accused, which is wholly exculpatory, should not be made the foundation of an order of acquittal especially at the close of the case for the prosecution, since at that stage, the accused not having given evidence himself, his explanations could not be tested by cross-examination.

[Appeal allowed. Order of acquittal and discharge set aside. Trial Judge directed to call respondent to enter upon his defence].

[**Bahasa Malaysia** Translation of Headnote]

UNDANG-UNDANG JENAYAH DAN PROSEDUR: Tuduhan mengedar dadah berbahaya - Mahkamah perbicaraan mendapati bahawa pihak pendakwa gagal mewujudkan kes prima facie - Rayuan terhadap pelepasan dan pembebasan tertuduh.

Responden memasuki Malaysia di pusat kemasukan imigresen di Bukit Kayu Hitam, Kubang Pasu, Kedah dengan bas dari Thailand menuju ke Singapura. Beliau membawa bersamanya sebuah peti aluminium dan sebuah beg bimbit. Heroin dijumpai dalam satu bahagian rahsia pada lapisan kedua di bahagian bawah peti tersebut. Responden telah dituduh mengedar dadah seberat 2,233.9 gram yang bertentangan dengan s. 39B Akta Dadah Berbahaya (Akta tersebut).

Hakim perbicaraan memutuskan bahawa pihak pendakwa telah gagal untuk mengemukakan bukti yang mana, jika tidak dipatahkan, akan membawa kepada kesabitan kesalahan berdasarkan kepada dua alasan; iaitu kelakuan dan tingkah laku responden pada ketika penangkapannya dan sejurus selepas itu serta kenyataan beramaran yang bebas sepenuhnya yang dibuat oleh responden sehari selepas penangkapannya. Responden telah dibebaskan dan dilepaskan tanpa dipanggil untuk memasukkan pembelaan dan Pendakwa Raya membuat rayuan.

Diputuskan:

[1] Adalah jelas, dipenutupan kes bagi pihak pendakwa, bahawa peti tersebut berada dalam milikan biasa responden dan bahawa heroin tersebut yang merupakan hal perkara tuduhan berkenaan dijumpai daripada satu bahagian tersembunyi dalam peti tersebut. Atas bukti tersebut, adalah disifatkan, sehingga dibuktikan sebaliknya, bahawa heroin tersebut berada dalam milikan responden dan responden tahu mengenai dadah tersebut berdasarkan kepada s. 37(1)(d) Akta tersebut, dan seterusnya, hendaklah dianggap, sehingga dibuktikan sebaliknya, sebagai mengedar dadah tersebut, berdasarkan kepada s. 37(1)(da) Akta tersebut.

[2] Kelakuan dan tingkah laku tertuduh mungkin adalah relevan dan oleh yang demikian ia boleh diambilkira apabila menimbangkan berat yang patut diberikan kepada versi pihak pembela tetapi tidak mencukupi olehnya sendiri, bagi mematahkan suatu anggapan statutori yang telah dibangkitkan terhadap tertuduh.

[3] Begitu juga, di mana bebannya ialah di atas tertuduh bagi mematahkan sesutau anggapan statutori, pernyataan secara sukarela oleh tertuduh di luar Mahkamah, yang mana bebas sepenuhnya, tidak harus dijadikan sebagai asas untuk memberikan perintah pembebasan terutamanya dipenu-tupan kes bagi pihak pendakwa, memandang-kan pada ketika itu, tertuduh tidak mem-berikan keterangannya sendiri, penerang-annya tidak dapat diuji melalui pemeriksaan balas.

[Rayuan dibenarkan. Perintah pelepasan dan pembebasan diketepikan. Hakim perbicaraan diperintahkan supaya responden dipanggil untuk memasukkan pembelaannya].

Cases referred to:

Yuveraj v. Public Prosecutor [1969] 2 MLJ 89 ***(foll)***
Day v. Dyson [1965] VR 165 ***(not foll)***
Public Prosecution v. Lin Lian Chen [1992] 2 MLJ 561/[1992] 4 CLJ 2086 ***(dist)***
R v. Donaldson [1977] 64 Cr. App. R. 59, 64 CA ***(refd)***
R v. McCarthy (GJ) [1980] 71 Cr. App. R 142 CA ***(refd)***

Legislation referred to:

Australian Constitution, s. 92
Dangerous Drugs Act 1952, ss. 2, 37 (1)(d), (da), 39B

For the public prosecutor - Ng Aik Guan, DPP
For the respondent - M.M. Athimular; M/s. Kumar Sitham & Co.

JUDGMENT

Edgar Joseph Jr. SCJ:

The respondent, a Nigerian National, was prosecuted in the High Court, Alor Setar, on a single count of trafficking in a dangerous drug to wit, heroin, weighing 2233.9 grams on 20 October 1990, in contravention of s. 39B of the Dangerous Drugs Act 1952.

At the close of the case for the prosecution, the trial Judge (Judicial Commissioner Mohd. Noor bin Hj. Abdullah) acquitted and discharged him without calling upon the defence on the ground that the prosecution had not established a *prima facie* case. The public prosecutor being dissatisfied with that decision had appealed to this Court.

According to the evidence led by the prosecution, on 20 October 1990, at 3.30 p.m., the respondent had entered Malaysia at an immigration entry point at Bukit Kayu Hitam, Kubang Pasu, Kedah, by bus from Thailand on transit to Singapore. He carried with him an alluminium trunk and a briefcase. On arrival at the Customs counter, he declared certain ceramic items contained in the trunk which he opened with a key. On examination, by Customs Officer Roslan bin Othman (PW2), the briefcase was found to contain ceramic items and personal items and the trunk to contain clothes and ceramic items. As the respondent had intended to take the ceramic items to Lagos, Nigeria, he was required to, and did pay a sum of RM250 described as a "deposit/security". Customs Officer Baharom bin Haji Ahmad (PW3) then sealed the trunk, and the respondent then walked back to his bus carrying with him the briefcase and the trunk.

At this point, another Customs Officer of the Drug Preventive Unit, caught sight of the respondent as he walked towards the bus and, at the former's behest, yet another Customs Officer Chow Kum Weng (PW6) stopped the respondent requesting him to proceed to the office of the Preventive Branch, Customs and Excise Department. This, the respondent did and, on arrival there, a specially trained dog sniffed the trunk with positive results. An inspection of the inside of the trunk revealed

nothing incriminating but when Customs Officer Chow Kum Weng puntured a hole at the bottom layer of the trunk, a white powdery substance oozed out. A more detailed examination of the trunk then followed and this resulted in the recovery of a quantity of white powdery substance - suspected to be heroin - concealed in a double layer secret compartment located at the bottom of the trunk. The respondent was then promptly placed under arrest and the trunk with its contents seized.

The powdery substance was then duly sent to the Government Chemist Mr. Chong Sip Seng (PW1), who examined and analysed it according to the usual procedures, and, as a result, confirmed the suspicions of the Customs Officers, that it did indeed contain heroin, a dangerous drug within the meaning of s. 2 of the Dangerous Drugs Act, having a net weight of 2233.9 grams.

The Chemist also examined the trunk and found that it had a specially constructed double layer bottom which had been opened up at three of its edges. He also found traces of the white powdery substance containing heroin in the double layer bottom of the trunk.

In ruling that the prosecution had failed to tender evidence which, if unrebutted would warrant a conviction, the trial Judge relied upon two grounds; that is to say,

(a) the conduct and demeanour of the respondent at the time of his arrest and shortly thereafter and, more importantly,
(b) the wholly exculpatory cautioned statement of the respondent made the day after his arrest.

As to the conduct and demeanour of the respondent, the trial Judge referred to the testimony of the Head of the Preventive Branch, Customs and Excise, Encik Mohd. Daud bin Md. Ali (PW9), who witnessed the discovery of the heroin. According to this witness, the respondent "shook his head in disbelief as to how the thing came to be there", was "calm", and "did not try to be evasive", and was "co-operative".

As to the cautioned statement of the respondent, the trial Judge noted that in it the respondent had given a detailed account as to how he came to be in possession of the trunk, by whom and in what circumstances it was given to him by a friend with instructions to deliver it to the friend's brother. The respondent went on to give particulars of his itinery, the purpose of his travels, his financial resources, his occupation and his family. The gist of the explanation offered in the cautioned statement being that the respondent did not know that the trunk contained the heroin and so he was merely an innocent carrier.

In the event, the trial Judge found that it was more likely than not that the respondent did not know that the trunk contained the heroin, and accordingly ruled that the prosecution had failed to establish a case to answer. Accordingly, he acquitted and discharged the respondent.

One thing was clear at the close of the case for the prosecution and that was that the respondent was in manual possession of the trunk and that the heroin the subject matter of the charge was recovered from a secret compartment therein.

Upon that evidence, it was to be deemed, until the contrary was proved, that the respondent was in possession of the heroin and to have known the nature of such drug, by reason of s. 37(1)(d) of the Act, and further, was to be presumed, until the contrary was proved, to be trafficking in the same, by reason of s.37(1)(da) of the Act.

With respect to the trial Judge, we considered that he was wrong to have acquitted the respondent at the close of the case for the prosecution because, neither the conduct and demeanour of the respondent, accepting that to be consistent with innocence, nor his cautioned statement, (which, if true was a complete answer to the charge), should have constituted "proof to the contrary" sufficient to rebut the statutory presumptions raised against him, having regard to the principles enunciated in *Yuveraj v. Public Prosecutor* [1969] 2 MLJ 89.

To elaborate, the conduct and demeanour of an accused, may well be relevant and may therefore be taken into consideration when considering what weight should be accorded to the defence version but **should** not by themselves be sufficient, to rebut a statutory presumption which has been raised against an accused person.

In the same way, in a case where the *onus* lies on an accused to rebut a statutory presumption, a voluntary out of Court statement by the accused - and this would include a cautioned statement - which is wholly exculpatory **should** not be made the foundation of an order of acquittal especially at the close of the case for the prosecution, since, at that stage, the accused not having given evidence himself, his explanations could not be tested by cross-examination.

In *Day v. Dyson* [1965] VR 165, the defendant - on whom lay the burden of proof on the issue of a defence based on s. 92 of the Australian Constitution that the vehicle in question was being used in the course of interstate trade - sought to rely on claims as to an interstate operation contained in an interview with the defendant which was led in evidence by the prosecution. It was held that, in a case where the *onus* lies on the defendant, evidence of innocence must be found elsewhere than in unsworn statements made out of Court by the defendant or his agents.

With respect, in our view, it is not correct to say that an unsworn self-serving out of Court statement by an accused by itself is incapable, as a matter of law, of discharging an *onus* which lies upon him. The proper comment should be that such a statement **should** not be sufficient by itself to discharge the onus lying on the accused.

This immediately brings to mind our decision in *Public Prosecution v. Lin Lian Chen* [1992] 2 MLJ 561, an appeal against an order of acquittal and discharge recorded at the close of the case for the prosecution, in a drug trafficking case where it was alleged by the prosecution that the accused was found in possession of heroin recovered from a car which he was driving at the time he was stopped and arrested. In upholding a submission of no case to answer, the trial Judge had relied, not just on the wholly exculpatory statement of the accused (which he had admitted over the objection of the learned Deputy Public Prosecutor) but on **other cogent evidence** appearing in the case for the prosecution, which went to show that the explanation in the cautioned statement as to the circumstances whereby he came to be driving the car, which was not his, at the behest of a friend and the circumstances under which a plastic bag containing the offending drug had been placed in the car by an old man, the contents of which he knew nothing of, could reasonably and probably be true.

On appeal, it was held, dismissing the appeal and upholding the order of acquittal and discharge, that;

(1) the trial Judge was correct in admitting the cautioned statement of the accused, and
(2) having regard to the circumstantial evidence, it could not be reasonably inferred that the accused must have been in custody or control of the drugs and
(3) in the circumstances, there was insufficient evidence, to attract the presumption of possession or control under s. 37(d) and consequently of trafficking under s. 37(da).

In the circumstances, *Lin Lian Chen's* case is readily distinguishable from the present case and we would take the opportunity to say that we see no reason whatever to depart from anything we had said there.

Having said that, we would add that if, and when, the respondent gives evidence to the same effect as his cautioned statement, he is entitled to take advantage of it and to point out that it is consistent with his evidence. Furthermore, as was rightly pointed out in *R. v. Donaldson* [1977] 64 Cr. App. R. 59, 64 CA, a purely exculpatory statement made by a defendant out of Court:

> is evidence at the trial in that it is evidence that the defendant made the statement and of his reaction which is part of the general picture which the jury have to consider but it is not evidence of the facts stated.

It follows, as the Court did in fact hold in *Donaldson*, that it is a misdirection to say that anything which a defendant may have said in his out of Court statement is not evidence in the case save in so far as it may consist of an admission.

To the same effect is *R. v. McCarthy (GJ)* [1980] 71 Cr. App. R. 142 CA in which the trial Judge had refused to admit oral and written self-exculpatory statements made out of Court by the accused to the police on the ground that they were self-serving. The accused had told

the police at the time of making the statements that they were at liberty to check his movements if they so wished. It was held, on appeal, that that was a misdirection. Lawton LJ in delivering the judgment of the Court of Appeal said this at p. 145:

> He (counsel for the appellant) pointed out that although the details were not evidence of the facts, the reaction of McCarthy when questioned by the police officer at the beginning of the interview was something which the jury could properly take into account as having some relevance to the genuineness of the defence of alibi.
>
> In our judgment (counsel) was right. One of the best pieces of evidence that an innocent man can produce is his reaction to an accusation to crime. If he has been told, as the appellant was told, that he was suspected of having committed a particular crime at a particular place and he says at once, 'That cannot be right, because I was elsewhere' and gives details of where he was, that is something which the Jury can take into account.

Lest we be accused of an oversight, we have not overlooked the principle that where a statutory presumption is raised against an accused person, so that the legal burden of proof is imposed on him, he may rebut this presumption either by adducing evidence during the case for the defence or by pointing to evidence in the case for the prosecution. What we have said in this judgment does not in any way, conflict with this principle and, indeed, is entirely consistent with it.

In all the circumstances, we had arrived at the conclusion that the order of acquittal and discharge be set aside with a direction to the trial Judge that the respondent be called to enter upon his defence. We need hardly add, since it goes without saying, that at the conclusion of the case for the defence, the trial Judge will have to make up his own mind as to whether the respondent has succeeded in rebutting the statutory presumptions which have arisen against him.

TAJJUL ARIFFIN BIN MUSTAFA

v.

HENG CHENG HONG

SUPREME COURT, KUALA LUMPUR
TAN SRI DATO' HARUN MAHMUD HASHIM SCJ, DATO' EDGAR JOSEPH JR. SCJ, DATUK WIRA WAN YAHYA BIN PAWAN TEH SCJ
[CIVIL APPEAL NO. 03-41-1991]
14 APRIL 1993

PRACTICE & PROCEDURE: Application by defendant to add a second defendant - Whether application should be allowed - Ambit of Courts power under O.8 r.6(2)(b) Subordinate Courts Rules 1980 - Application that plaintiff plead particulars of negligence against proposed second defendant - Whether plaintiff can be required to add a second defendant against whom the plaintiff does not wish to proceed.

In this running down action, the defendant rider of a motor cycle applied to add a rider and, the latter's principal of another motor cycle, on which the plaintiff was riding pillion, as second and third defendants respectively. The defendant also applied for an order that the plaintiff make the necessary amendments to the statement of claim to plead particulars of negligence against the intended second and third defendants.

The question that, arose on appeal was the ambit of the Courts power under O.8 r.6(2)(b) of the Subordinate Courts Rules 1980 (equivalent to and in *pari materia* with O.15 r.6(2)(b) of the Rules of the High Court 1980) upon the application of the defendant, in a running down case, to compel the plaintiff to add a second defendant against whom the plaintiff did not wish to proceed.

Held:

[1] The principle of overriding importance is that all necessary and proper parties should be before the Court at the same time to enable the effectual and complete determination and adjudication to be made by the Court of all questions and issues between the parties which arise for decision. The Court has extensive discretionary powers to add substitute or strike out parties who are not proper or necessary and for these purposes the Court may act of its own motion.

[2] The power of the Court to add a defendant upon the application of the defendant is